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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

EILEEN GRAY,

Plaintiff and Appellant,

v.

SALUD CARBAJAL et al.,

Defendants and Respondents;

DAVID PULVER,

Real Party in Interest.

2d Civil No. B204575
(Super. Ct. No. 1263584)
(Santa Barbara County)

Eileen Gray appeals from an order dismissing her petition for writ of mandate for failure to serve and file the summons as required by Government Code section 66499.37.¹ We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Eileen Gray, through her attorney, filed a petition for writ of mandate challenging the County of Santa Barbara's approval of a subdivision of property. The petition was taken to the clerk's office for filing by the attorney's legal assistant. The legal assistant asked the superior court clerk if a summons was required. The court clerk

¹ All statutory references are to the Government Code unless otherwise stated.

replied that all that was needed to file the petition was a civil cover sheet. As a result, although the petition was filed and served timely, no summons was issued or served.

The County filed a motion to dismiss the petition for failure to serve a summons in compliance with section 66499.37. Gray opposed the motion by filing a declaration from the legal assistant and her attorney's paralegal stating that the court clerk told her no summons was required. The trial court granted the motion to dismiss.

On appeal Gray contends the trial court erred in granting the dismissal because her attorney relied on the advice given by the court clerk giving rise to an estoppel. In the alternative, Gray argues that the statute of limitations was tolled under Code of Civil Procedure section 583.240, subdivision (d), because the court clerk's action made it impossible to serve the summons.

DISCUSSION

The sole question on this appeal is whether Gray should be relieved from the bar of the statute of limitations contained in section 66499.37. That section states: "Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, . . . shall not be maintained by any person unless such action or proceeding is commenced and *service of summons effected* within 90 days after the date of such decision. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings, acts, or determinations. . . ." (Italics added.) The statute reflects a policy by the Legislature that "litigation involving the Subdivision Map Act must be resolved as quickly as possible consistent with due process." (*Maginn v. City of Glendale* (1999) 72 Cal.App.4th 1102, 1109-1110, citing *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 23.)

Estoppel

Gray contends that the court clerk's advice relieved her of the obligation to effect service of the summons within the time required by section 66499.37. The argument is without merit.

Life v. County of Los Angeles (1991) 227 Cal.App.3d 894, is on point. In that case, plaintiff's lawsuit against the County was dismissed because he failed to file a claim in the manner required by the Government Tort Claims Act (§ 910 et seq.). Plaintiff contended the county was estopped from asserting the claims statute because a medical records clerk gave plaintiff's attorney erroneous information regarding filing the claim. The court rejected the argument, stating: "Estoppel requires, inter alia, a representation or concealment of material facts to a party ignorant, 'actually and permissibly,' of the truth. [Citation.] In view of section 915 and applicable case law, it cannot be maintained that [the attorney] reasonably could rely on the advice of a medical records clerk to file a claim with the hospital's legal department, so as to estop the County." (*Life*, at p. 902.)

Life applies here. Section 66499.37 expressly requires service of summons. This statute has been the subject of numerous appellate decisions. (See, e.g., *Hensler v. City of Glendale*, *supra*, 8 Cal.4th 1; *Sprague v. County of San Diego* (2003) 106 Cal.App.4th 119 [county not estopped from seeking to dismiss action for failure to serve summons as required by section 66499.37 by failing to raise as affirmative defense in its initial answer; relief from default for attorney mistake under Code Civ. Proc., § 473 not available to relieve noncompliance with statute's requirement to serve summons within 90 days]; *Maginn v. City of Glendale*, *supra*, 72 Cal.App.4th at p. 1108 ["In . . . section 66499.37 . . . the Legislature expressly required not only that the action be commenced within 90 days, but also that service of summons be effected within the same 90 days. The statutory language makes clear that the service requirement is mandatory"]; and see 1 Cal. Administrative Mandamus (Cont.Ed.Bar 3d ed. 2008) § 10.49, p. 393 ["Although it is generally true that no summons issues or is served in an administrative mandamus proceeding, an action or proceeding under the Subdivision Map Act . . . to set aside a legislative body's decision concerning a subdivision map requires service of summons within 90 days after the date of the decision"].)

Given the express terms of section 66499.37 and the numerous authorities construing that statute, reliance on advice given by the court clerk was not reasonable and does not give rise to an estoppel.

*Service of Summons Was Not Impossible Under
Code of Civil Procedure Section 583.240*

Gray argues she is relieved from complying with serving summons because the court clerk made it impossible to do so. She relies on Code of Civil Procedure section 583.240, subdivision (d). That section excludes from the time within which to serve summons time periods in which "[s]ervice, for any . . . reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control." A similar argument was made and rejected in *Maginn v. City of Glendale*. In that case, the court said: "We assume for the purpose of discussion that the clerk's refusal to issue summons on August 12 made it 'impossible' to serve defendant with summons on that date. But this 'impossibility' lasted only one day, until August 13. This means that *one day* is excluded in computing the time within which defendant must be served" (72 Cal.App.4th at p. 1108; see also *Bishop v. Silva* (1991) 234 Cal.App.3d 1317, 1323-1324 [Code Civ. Proc., § 583.240 should be strictly construed against excuses; whether defendant had actual knowledge of the lawsuit is irrelevant].)

*Code of Civil Procedure Section 128
Does Not Authorize a Court to Rewrite Statutes*

In the order granting the motion to dismiss, the trial judge stated that he "would welcome an appellate decision resolving the issue where a properly, and timely, served Petition simply lacks a Summons and authorizing this court when faced with a minor defect in jurisdictional service under its broad inherent power codified in Code of Civil Procedure section 128, 'to fashion new remedial procedures when it is advisable to do so, in order to deal with new issues or protect the rights of the parties.'" We decline the invitation. Our role is to interpret the laws, not make them. We would be rewriting the statute were we to engraft the exception proposed by the trial court. As stated in *Shipley v. Sugita* (1996) 50 Cal.App.4th 320, 328: "If the Legislature wishes to extend

the circumstances under which mandatory dismissal may be avoided, it may do so. To date, it has not."

Section 66499.37 requires summons to be served. To the extent the court clerk is giving erroneous or misleading advice to parties or their counsel, the remedy lies with the administration of the clerk's office.²

The judgment is affirmed. Costs are awarded to respondents.

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PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

² We deny Gray's request to take judicial notice of a different case currently on appeal in this court. Gray asserts the case has facts similar to those here, i.e., that the Santa Barbara County court clerk advised a party that only a civil case cover sheet was required to file a petition for writ of mandate. We deny the request on the grounds of relevancy—the facts in that case appear to be substantially different.

James W. Brown, Judge
Superior Court County of Santa Barbara

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